IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS. M.D., Petitioners, v. TERRY E. BRANSTAD and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 **RESPONDENTS' TRIAL BRIEF**

INTRODUCTION

Petitioners Planned Parenthood of the Heartland and Jill Meadows seek to permanently enjoin enforcement of Division I of Senate File 471 ("the Act"). They argue that the Act violates their rights and the rights of their patients under the due process and equal protection clauses of the Iowa Constitution, articles 1, 6, and 9. In an order dated May 9, 2017, the Iowa Supreme Court temporarily stayed the effective date of the Act during the pendency of this proceeding. The stay expires ten days after this Court's ruling on the merits of the Petition.

I. FACTUAL BACKGROUND

A. The Parties

Petitioner Planned Parenthood of the Heartland is a nonprofit corporation that operates health centers at three locations in the Des Moines area as well as locations in Ames, Bettendorf, Cedar Falls, Cedar Rapids, Council Bluffs, and Iowa City. Planned Parenthood employs physicians and other staff who provide medication and surgical

abortions to patients. Petitioner Jill Meadows is a physician and the medical director of Planned Parenthood of the Heartland. Meadows performs both medication and surgical abortions in Iowa. At current staffing levels, Planned Parenthood of the Heartland schedules patients for abortion procedures 1-2 days per week. Appointments are typically scheduled weeks in advance.

Respondent Terry E. Branstad is the Governor of Iowa. Petitioners brought this action against Governor Branstad in his official capacity. As governor, the Iowa Constitution requires that he "take care that the laws are faithfully executed." Iowa Const. art. IV, § 9. Respondent Iowa Board of Medicine is a state agency tasked with regulating physicians and surgeons. The Act requires that the Board of Medicine develop rules for the administration of the Act. The Board of Medicine is also responsible for the discipline of physicians who fail to comply with the Act's requirements.

B. The Act

The Act was passed on April 18, 2017. Respondent Terry E. Branstad signed the bill on May 5, 2017. The Act was to take effect immediately. The challenged portion of the Act requires "[a] physician performing an abortion" to obtain written certification from the pregnant woman of the following at least 72 hours prior to performance of the abortion:

> a. That the woman has undergone an ultrasound imaging of the unborn child that displays the approximate age of the unborn child.
>
> b. That the woman was given the opportunity to see the unborn child by viewing the ultrasound image of the unborn child.

> c. That the woman was given the option of hearing a description of the unborn child based on the ultrasound image and hearing the heartbeat of the unborn child.
>
> d. (1) That the woman has been provided information regarding all of the following, based upon the materials developed by the department of public health pursuant to subparagraph (2):
>
> (a) The options relative to a pregnancy, including continuing the pregnancy to term and retaining parental rights following the child's birth, continuing the pregnancy to term and placing the child for adoption, and terminating the pregnancy.
>
> (b) The indicators, contra-indicators, and risk factors including any physical, psychological, or situational factors related to the abortion in light of the woman's medical history and medical condition.

The Iowa Department of Public Health has developed materials that must be provided to the woman under the Act. Those materials are available on the department's website. The Board of Medicine is in the process of adopting rules to administer the Act. The rulemaking process, currently proceeding subject to the May 9 stay, will be complete by the time this litigation concludes.

Prior to the Act, a physician was required to certify that a woman was given the opportunity to view an ultrasound image of the unborn child and that she was provided information about the options relative to a pregnancy before performing an abortion. The physician could obtain the certification on the same day as the abortion procedure. The Act added a requirement that the woman be given an option to hear the fetal heartbeat, that the information provided must be based on the materials developed by the Department of Public Health, and that the certification must occur 72 hours prior to the abortion procedure. The stated purpose of the Act is to protect all unborn life.

II. KEY ISSUES FOR TRIAL

A. Motion to Dismiss

Respondents filed a motion to dismiss the petition on May 23, 2017. The motion asserts sovereign immunity, Planned Parenthood of the Heartland's lack of standing to assert the rights of its patients, and Petitioners' failure to state a claim under the due process and equal protection clauses of the Iowa Constitution. Petitioners resisted the motion on June 23, 2017.

B. Petitioners' Due Process Claim

a. Proper Level of Scrutiny

Petitioners seek declaratory and injunctive relief based on an alleged violation of the due process rights of Petitioners and women in Iowa who seek abortions. When a statute is challenged under the substantive component to the due process clause, there are two levels of scrutiny that courts apply depending on the nature of the right at issue. The baseline that applies to every liberty interest proscribes any law that is not rationally related to a legitimate government interest. For a select few of our most important rights, a law that infringes the right must pass a higher hurdle.

The Iowa Supreme Court has adopted a two-step analysis to determine the proper level of scrutiny under the due process clause. Step one requires the Court to determine whether the right at issue qualifies as "fundamental." That is, a right which, after a "careful description," is "firmly rooted" in the State's "history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997); *see also State v. Seering*, 70 N.W.2d 655, 664-65 (Iowa 2005) (following *Glucksberg*); *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (same). Strict scrutiny applies to statutes that *directly and*

substantially interfere with a fundamental right. *Seering*, 701 N.W.2d at 663. If a fundamental right is not involved, or if the statute does not substantially interfere with a fundamental right that is involved, the rational basis test applies. *McQuistion v. City of Clinton*¸ 872 N.W.2d 817, 832-33 (Iowa 2015).

The Iowa Supreme Court has not decided whether abortion qualifies as a fundamental right under the Iowa Constitution. *See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Medicine*¸ 865 N.W.2d 252 (Iowa 2015) (Parties agreed to proceed under the federal undue burden test, so Court "need[ed] not decide whether the Iowa Constitution provides [a right to an abortion], and if so, whether regulations affecting that right must pass strict scrutiny."). It does not. A right to an abortion is not firmly rooted in the State's history, legal traditions, and practices. Iowa first criminalized abortion in 1839. *See* Iowa (Terr.) Laws 153-54 (1838-39). Shortly after the adoption of the Iowa Constitution, the legislature passed a statute criminalizing abortions at any stage of a pregnancy unless necessary to save the mother's life. Iowa Rev. Laws § 4221 (1860). This statute remained nearly unchanged until it was struck down under the federal constitution following *Roe v. Wade*, 410 U.S. 113 (1973). *See Doe v. Turner*, 361 F. Supp. 1288 (S.D. Iowa 1973). Just three years prior to *Roe*, Iowa's principal abortion statute survived vagueness and equal protection challenges in *State v. Abodeely*¸ 179 N.W.2d 347, 354-55 (Iowa 1970).

Even if abortion qualified as a fundamental right, strict scrutiny is still inappropriate for Petitioners' due process claim. The challenged portion of the Act does not directly and substantially interfere with the right to an abortion. The Act adds a 72-hour waiting period, requires that women be afforded an opportunity to hear the fetal

heartbeat, and makes uniform the required information concerning options and risks. Iowa law already required that women undergo an ultrasound prior to an abortion. Because abortion is not a fundamental right and because the Act does not substantially interfere with the right to an abortion, the rational basis analysis is appropriate.

The rational basis analysis requires the Court to determine whether there is "a reasonable fit between the government interest and the means utilized to advance that interest." *Seering*, 701 N.W.2d at 662. The stated purpose of the Act is to protect all unborn life. As the United States Supreme Court has recognized, a "waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn." *Planned Parenthood of Southeastern Pa. v. Casey*¸ 505 U.S. at 885. As a result, Respondents intend to argue that Petitioners' due process claim fails as a matter of law at the conclusion of the trial.

b. The Act Satisfies the Federal Undue Burden Standard

The United States Supreme Court has determined that the decision to have an abortion stands in a category of protected constitutional rights all its own. In his partial dissent in *Planned Parenthood of Southeastern Pa. v. Casey*, Justice Rehnquist explained:

> We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion involves the purposeful termination of a potential life. The abortion decision must therefore be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

See 505 U.S. 833, 952 (Rehnquist, J., concurring in part and dissenting in part) (internal quotations and citation omitted). Applying strict scrutiny to "all governmental attempts to influence a woman's decision on behalf of the potential life within her" is incompatible with the "substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876. The "undue burden" standard emerged as the lodestar for challenges to abortion regulations under the United States Constitution. *Id.* ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

A "guiding principle" of the undue burden test reminds courts that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. In other words, the undue burden standard operates as a rational basis test with an added element. The added element identifies the class of women affected by the statute and asks whether the statute is "likely to prevent a significant number of women from obtaining an abortion." *Id*. at 877, 893. If not, "a state measure designed to persuade [a pregnant woman] to choose childbirth over abortion will be upheld if reasonably related to that purpose"—the rational basis test.

If this Court applies the federal undue burden test, the key issue at trial will be whether the Act will prevent a significant number of women from obtaining an abortion. As the *Casey* decision says, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874. The evidence will show that the Act will make abortion more difficult or more

expensive for some women, but Petitioners will not be able to prove that a significant number of women will be unable to obtain an abortion as a result of the Act.

C. Petitioners' Equal Protection Claim

a. Abortion is Not A Fundamental Right

Petitioners also challenge the Act under the equal protection clause—article I, section 6—of the Iowa Constitution. This clause "is essentially a direction that all persons similarly situated should be treated alike." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (internal quotation omitted). In most cases, courts apply the rational basis test to equal protection challenges. *See Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009). When a fundamental right is involved, heightened scrutiny is appropriate. *Id.* at 880. As explained above, abortion is not a fundamental right under the Iowa Constitution.

b. The Act Does Not Discriminate on the Basis of Sex

In a due process challenge, if the right at issue is not fundamental the rational basis test applies. Under the equal protection clause a "middle tier" of scrutiny exists that applies to statutes that classify on the basis of gender. *Id.* This intermediate scrutiny requires that the challenged classification be "substantially related to the achievement of an important governmental objective." *Id.* Because abortions can only be performed on women, Petitioners argue that the Act discriminates on the basis of gender. It does not. Rather, the act "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (upholding a statutory rape statute that applied only to men).

The United State Supreme Court has recognized that "the disfavoring of abortion … is not *ipso facto* sex discrimination." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). In two cases dealing with government funding of abortions, that Court held that the applicable constitutional test "is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id.* (citing *Maher v. Roe*, 432 U.S. 464, 470-71 (1977), and *Harris v. McRae*, 448 U.S. 297, 322-24 (1980)). Unlike laws that use a woman's ability to become pregnant to discriminate against them in other areas, such as the disability income plan excluding "disabilities due to pregnancy" at issue in *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*¸ 268 N.W.2d 862 (Iowa 1978), challenges to abortion statutes are normally "examples of cases in which the sexes are not biologically similarly situated." *Jane L. v. Bangerter*¸ 794 F. Supp. 1537, 1549 (D. Utah 1992). For this reason, the rational basis standard is appropriate for assessing Petitioners' equal protection claim.

CONCLUSION

For the foregoing reasons, Respondents will ask that the Petition for declaratory and injunctive relief be denied at the conclusion of the trial.

Respectfully submitted,

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/_____
JEFFREY S. THOMPSON
Solicitor General of Iowa

/s/_____

THOMAS J. OGDEN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Bldg., 2nd Fl.
1305 East Walnut Street
Des Moines, Iowa50319
Phone: (515) 281-5976
Fax: (515) 281-4902
Email: Jeffrey.Thompson@iowa.gov
Email: Thomas.Ogden@iowa.gov